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SABAH LAW SOCIETY v. THE GOVERNMENT OF THE FEDERATION OF MALAYSIA & ANOR

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
ISMAIL BRAHIM J
[CASE NO: BKI-25-14-6-2022]
6 JULY 2023

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Abstract – *An application for judicial review revolving around a public interest litigation ('PIL') must fulfil two criteria: (i) the litigation is not brought for a personal wrong for which the applicant is seeking a remedy to redress its personal injury; and (ii) the litigation is brought to address a breach of a public duty for and on behalf of a section of the public who, because of their want of resources, would not be in a position to seek redress, and for which the PIL will redress an injustice perpetuated against the public.*

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ADMINISTRATIVE LAW: *Judicial review – Application for leave – Application against decision published in Government Gazette – Whether applicant clothed with locus standi – Whether applicant person adversely affected by decision – Whether application directed to lawfulness of Executive decision under statutory judicial review – Whether litigation brought to address breach of public duty for and on behalf of section of public – Whether public interest litigation – Whether relief focused on interpretation of constitutional provisions – Whether justiciable – Rules of Court 2012, O. 53 r. 2(4)*

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This was an application for leave for judicial review by the Sabah Law Society ('SLS') against the decision of the Government of the Federation of Malaysia. The decision was contained in a Federal Government Gazette publication wherein the respondent published an order 'The Federal Constitution (Review Of Special Grant Under Article 112D) (State Of Sabah) Order 2022' ('review order 2022'). The application was opposed by the Federal Attorney General ('AG'). The basis of the objection by the AG centred around two main issues: (i) *locus standi*; and (ii) non-justiciable. In regard to the issue of non-justiciability, by this judicial review, the applicant was asking for the upholding of a public duty owed to the people of Sabah. The art. 112D review should have been done not later than 1974, and that since it had not, for it was only carried out in 2022, the respondents had breached their constitutional duty. It was thus submitted that the issue was plainly justiciable. As for the issue of *locus standi*, the applicant submitted that the review order 2022 was undoubtedly 'a decision, action or omission in relation to the exercise of the public duty' under art. 112D of the Federal Constitution ('FC') read with art. 112C of the FC. It was further submitted that the application for judicial review fell within the category of cases in public law commonly called public interest litigation ('PIL').

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Held (allowing application):

(1) The relief requested by the applicant was focused on the interpretation of the constitutional provisions in respect of the payment of the 40% entitlement and if there were a breach or breaches of the constitutional provisions, their public redresses. The applicant was not seeking a remedy for a wrong against it, but rather upholding the rule of law and constitutional integrity. The applicant had shown that it had a real and genuine interest in the subject matter of the judicial review and was not a busy body. In the circumstances, it had the *locus standi* to commence the present judicial review application. (paras 18 & 27)

(2) The applicant's relief was for public redress for breach of the first respondent's public duty, a constitutional duty to pay 40% entitlement for each consecutive financial from the year 1974 to 2022. This issue was not to be determined at the leave stage as it involved arguments pertaining to the interpretation of articles of the Federal Constitution on the special grant. The applicant's action was not brought for a personal wrong or injury but to address a breach of a public duty of the first respondent for and on behalf of the public or the people of Sabah for which the public interest litigation would redress the breach of their constitutional rights. Hence, the application for leave to commence the judicial review application was allowed. (paras 29, 31 & 32)

Case(s) referred to:

Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals [2018] 3 CLJ 145 FC ***(refd)***

Malaysian Trade Union Congress & Ors v. Menteri Tenaga, Air Dan Komunikasi & Anor [2014] 2 CLJ 525 FC ***(refd)***

Malik Brothers v. Narendra Dadhich (1999) 6 SCC 552 ***(refd)***

QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor [2006] 2 CLJ 532 CA ***(refd)***

Semantan Estate [1952] Sdn Bhd v. Collector Of Land Revenue Wilayah Persekutuan [1987] 2 CLJ 199; [1987] CLJ (Rep) 329 SC ***(refd)***

SIS Forum (Malaysia) v. Kerajaan Negeri Selangor; Majlis Agama Islam Selangor (Intervener) [2022] 3 CLJ 339 FC ***(refd)***

WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd [2012] 4 CLJ 478 FC ***(refd)***

Yang Dipertua, Dewan Rakyat & Ors v. Gobind Singh Deo [2014] 9 CLJ 577 FC ***(refd)***

Legislation referred to:

Advocates Ordinance (Sabah)(Cap 2), s. 13A, (a), (e)
Federal Constitution, arts. 4(4), 112C, 112D(1), (2)
Rules of Court 2012, O. 53 rr. 2(4), 3(2)
Specific Relief Act 1950, s. 44

For the applicant - David Fung & Jeyan T M Marimutthu; M/s J Marimutthu & Partners
For the 1st respondent - Suzana Atan; DPP
For the 2nd respondent - Tengku Ahmad Fuad Tengku Ahmad; M/s F T Ahmad & Co

Reported by S Barathi

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JUDGMENT

Ismail Brahim J:

Decision

B **[1]** This is an application for leave by Sabah Law Society's (SLS) for judicial review of The Government of the Federation of Malaysia's decision and for the remedies of *certiorari*, declaration, *mandamus*, and payment of entitlement and/or constitutional damages under ROC 2012, O. 53 r. 3(2).

C **[2]** The decision is contained in a Federal Government *Gazette* publication dated 20 April 2022; the respondent published an order "The Federal Constitution (Review Of Special Grant Under Article 112D) (State Of Sabah) Order 2022" ('review order 2022').

D **[3]** The application for leave was opposed by the Federal AG (AG). The second respondent was also heard at this leave hearing after they were allowed to intervene. After hearing the submissions of the parties, I allowed the application for leave, as I am of the view that there are merits in the applicant's arguments that they have the *locus standi* to institute the JR application and that they have also shown that they are entitled to commence the judicial review as a public interest litigation.

E **[4]** The facts leading to this application have been sufficiently set out by the applicant in the cause papers and they are hardly any dispute to the facts.

[5] The basis of the objection to the leave application by the AG centres mainly around two main issues. First is the *locus standi* of the applicant and second is the issue of the non-justiciable.

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The Issue Of *Locus Standi*

[6] It is the AG's contention that the applicants have failed to show that they were within the provision of "any person adversely affected by the decision" as stated in O. 53 r. 2(4) of the ROC 2012. Further, it was also G argued that there was no decision, action or omission falling within the ambit of the said order, hence the applicant has no *locus standi*.

(See: *Malaysian Trade Union Congress & Ors v. Menteri Tenaga, Air Dan Komunikasi & Anor* [2014] 2 CLJ 525; [2014] 3 MLJ 145 and *QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor* [2006] 2 CLJ 532; [2006] 3 MLJ 164).

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[7] Further, it was argued that to seek a declaration, the applicant must establish that he had acquired a legal status or rights against the respondents which required to be protected by declaratory orders.

[8] As the applicant had also applied for an order of *mandamus*, the I applicant must also fulfil the conditions of s. 44 of the Specific Relief Act 1950. (See *Semantan Estate [1952] Sdn Bhd v. Collector Of Land Revenue Wilayah Persekutuan* [1987] 2 CLJ 199; [1987] CLJ (Rep) 329; [1987] 2 MLJ 346).

[9] In the present case, it was also argued that the applicant has neither a sufficient personal interest nor this application is a public interest litigation.

[10] It was further submitted that by virtue of art. 112D(1) of the Federal Constitution, the adversely affected persons pursuant to O. 53 r. 2(4) of the ROC 2012 are the Governments *ie*, the Federal Government and the State Government of Sabah.

The Non-Justiciable Issue

[11] In this regard, it was submitted that the crux of this judicial review application by the applicant is the review of the special grant exercised under art. 112D(1) of the Federal Constitution.

[12] It was further submitted that the exercise of this review of the special grant involves non-legal factors pursuant to art. 112D(2) of the Federal Constitution where the review of the special grant shall take into account the financial ability of the Federal Government as well as the needs of the State Government of Sabah.

[13] In support of this issue, the AG refers to the Federal Court's decision in the case of *Yang Dipertua, Dewan Rakyat & Ors v. Gobind Singh Deo* [2014] 9 CLJ 577; [2014] 6 MLJ 812 (Tab 15 of AGBOA p. 822) as follows:

> [18] Justiciability concerns the limit upon legal issues over which a Court can exercise its Judicial Authority. **If the Court has no authority to adjudicate over the dispute, then it is non-justiciable**. (emphasis added)

[14] In support of this argument, the SFC has submitted at length on this issue. For the purpose of this judgment, I do not propose to set out the submission here in full as I agree with the SFC that as far as the decision on the amount of special grants reviewed under art. 112D of the Federal Constitution is an Executive action by both Governments, taking into account fiscal and administrative considerations which are exclusively within the domain of the Executive authorities.

[15] However, it is to be noted that the judicial review is not only confined to challenging the review provided by art. 112D of the Constitution but it is also directed at the breach of constitutional duty of the first respondent under the Constitution towards the State of Sabah.

[16] In relation to the above two issues, the applicant submitted that in regard to the issue of non-justiciable, the applicant submitted by this judicial review, the applicant is asking for the upholding of a public duty owed to the people of Sabah. That is to say, the art. 112D review should have been done not later than 1974, and that since it had not, for it was only carried out in 2022, the respondents have breached their constitutional duty that has legal consequences.

A **[17]** It was submitted that this is plainly a justiciable issue and this court undoubtedly has the ability and power to hear a dispute concerning this issue, for that is the court's quintessential role and function: see *Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals* [2018] 3 CLJ 145 (Tab 6 of AGBOA at pp. 131 to 197).

B **[18]** In the present application for judicial review, the relief requested focuses on the interpretation of the constitutional provisions in respect of the payment of the 40% entitlement and if there were a breach or breaches of the constitutional provisions, their public redresses. The applicant is not asking the court to conduct an art. 112D review. An art. 112D review is one C to be undertaken by the first and second respondents. (See the relief for *mandamus*).

[19] The applicant also took the position that in the present judicial review, the applicant is challenging the lawfulness of the Executive's decision under statutory judicial review and not the validity of the statute for voidness under D art. 4(4) of the Federal Constitution. In short, it is directed to lawfulness of the Executive's decision under the statutory judicial review. (See *SIS Forum (Malaysia) v. Kerajaan Negeri Selangor; Majlis Agama Islam Selangor (Intervener)* [2022] 3 CLJ 339).

E **[20]** As for the *locus standi*, the applicant submitted that the review order 2022 is undoubtedly 'a decision, action or omission in relation to the exercise of the public duty' under art. 112D read with art. 112C. It was 'a decision, action or omission' in relation the exercise of public duty to make payment of the 40% entitlement or instead of it a grant in modification of the duty imposed on the first respondent under art. 112C subject to review F under art. 112D. The decision expressed in the review order 2022 was one only to pay a special grant annually at the amounts indicated therein for the period from 2022 to 2026. The glaring omission was the first respondent's action not to pay the 40% entitlement for the lost years despite the fact the respondents undertook the review in 2022 rather than the mandated time in G 1974.

[21] It was further submitted that this application for judicial review falls within the category of cases in public law commonly called Public Interest Litigation ('PIL'). It lies within the clearest part of the spectrum of PIL which should be permitted to be undertaken in the interest of the public.

H **[22]** It was argued that PIL is taken out in a judicial review of a public authority or officer's action or omission pursuant to the exercise of statutory powers and is expressly permitted as pronounced by both the Court of Appeal and the Federal Court in the following cases:

I *QSR Brands Bhd v Suruhanjaya Sekuriti* [2006] 2 CLJ 532], CA; *Malaysian Trade Union Congress v. Menteri Tenaga, Air dan Komunikasi* [2014] 2 CLJ 525 FC; and *Perbadanan Pengurusan Trellises v. Datuk Bandar Kuala Lumpur* [2021] 2 CLJ 808, CA.

[23] Following the ratios in these cases, there are two criteria that must be fulfilled, and the applicant had satisfied these criteria. Firstly, the litigation is not brought for a personal wrong for which the claimant wants a remedy to redress its personal injury. Secondly, the litigation is brought to address a breach of a public duty for and on behalf of a section of the public who because of their want of resources would not be in a position to seek redress, and for which the PIL will redress an injustice perpetuated against the public.

[24] It was further submitted that this judicial review which is a PIL brought for all the people of Sabah is hallmarked by the historical fact that the 40% entitlement was a constitutional right accorded to the people of Sabah for them to agree to form Malaysia. It was also pointed out that this fact was invariably not disputed but recognised by the first respondent. In the circumstances, it is fit and proper that it is the applicant which brought this judicial review as it is an impartial statutory body of Sabah Advocates instituted under the Advocates Ordinance (Sabah)(Cap 2) whose members must have Sabah connections, interpreted to mean having domicile in Sabah. It also certainly has the capacity to commence this judicial review for the subject matter of the judicial review falls within its object.

In accordance with s. 13A(a) and (e) of the Advocates Ordinance (exh. SLS-1 at pp. 5 to 6 of AA), the applicant is vested with necessary statutory powers and authority "to uphold the cause of justice without regard to its own interests or that of its members, uninfluenced by fear or favour" and "to protect and assist the public in all matters ... Relating, ancillary or incidental to, the law".

The Second Respondent

[25] In regard to the second respondent's position, the second respondent distinguishes between justiciable and non-justiciable grounds of challenge, arguing that the court can inquire into the existence of a constitutional power and its scope, but should not intervene in the exercise of that power if it has been lawfully exercised within its scope.

Reasons For Granting Leave

[26] After having considered the submissions of the parties, it is my finding that the applicant had shown that leave should be granted. It is trite and not disputed that at the leave stage, the threshold to be met by the applicant is low. (See *WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd* [2012] 4 CLJ 478).

[27] On the issue of *locus standi*, I have considered the plaintiff's arguments that the applicant, a statutory body representing all Sabah Advocates, is not seeking a remedy for a wrong against it, but rather upholding the rule of law and constitutional integrity. In my view, the applicant has shown that it has

a real and genuine interest in the subject matter of the judicial review, and is not a busy body. In the circumstances, it has the *locus standi* to commence the present judicial review application.

[28] In determining that the applicant has *locus standi*, I have also taken into consideration the first respondent's arguments that the issue is non-justiciable. I do not think this argument ought to derail the applicant's arguments that it has the *locus standi* as here, the applicant has clearly made its position very clear that it was not challenging the lawfulness of the contents of the review order 2022.

[29] The applicant's relief here is for public redress for breach of the first respondent's public duty, a constitutional duty to pay 40% entitlement for each consecutive financial from the year 1974 to 2022. This issue is to not be determined at this leave stage as it involves arguments pertaining to the interpretation of the articles of the Federal Constitution on the special grant.

[30] In regards to the arguments by the applicant that it ought to be allowed to commence the judicial review as a PIL, I think based on the facts of this case, the applicant's application falls clearly within principles established in the *ratio decidendi* of *QSR Brands Bhd v. Suruhanjaya Sekuriti* [2006] 2 CLJ 532 and *Malaysian Trade Union Congress & Ors v. Menteri Tenaga, Air Dan Komunikasi* [2014] 2 CLJ 525 which made reference to the Indian Supreme Court's *ratio* on what comprises PIL in *Malik Brothers v. Narendra Dadhich* (1999) 6 SCC 552.

[31] In this case, it is clear that the applicant's action is not brought for a personal wrong or injury but to address a breach of a public duty of the first respondent for and on behalf of the public or the people of Sabah for which the PIL will redress the breach of their constitutional rights.

[32] Based on all the above reasons, the application for leave to commence the judicial review application is allowed.